No. 85-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISME,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IOWA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

PETER HEIDENBERGER
1815 H St., N.W. Suite 400
Washington, D.C. 20006
(202) 296-3181

Counsel of Record for Amicus Curiae Federal Republic of Germany

August 22, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether United States courts, having personal jurisdiction, may order the pre-trial production of documents located abroad in disregard of the Hague Evidence Convention.

2. Whether pursuant to the principles of international law United States courts should apply the Hague Evidence Convention when a discovery order results in a violation of foreign sovereignty or clearly established principles of a foreign nation.

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BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE*

INTEREST OF THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

The issue before the Court is the applicability of the Hague Evidence Convention.[1] The Federal Republic

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* Letters expressing the consent of the Parties are on file with the Clerk of the Court.

[1] Hague Convention on the Taking of Evidence Abroad in Civil

of Germany is a party to the Convention and is greatly concerned over United States courts' failure to apply it.

In *Anschuetz & Co. GmbH v. Mississippi River Bridge Authority et al.*, 85-98 (U.S. 1985), and *Messerschmitt Bolkow Blohm GmbH v. Walker*, 85-99 (U.S. 1985), which deal essentially with the same issue, it has as amicus curiae presented its views on the applicability of the Convention to the taking of discovery evidence abroad.[2] The Federal Republic of Germany sets forth the following additional considerations on the issue of the applicability of the Evidence Convention.

SUMMARY OF ARGUMENT

The Evidence Convention is applicable in this case. This treaty should be applied when a district court orders the taking of evidence in the territory of a nation which is a party to it. Ordering without using the Convention the production in the United States of evidence located within the territory of a signatory to the Convention violates that foreign country's sovereignty when its legal system places the power to

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or Commercial Matters, *opened for signature*, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979).

[2] *See* 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S.Aug. 13, 1985) (No. 85-98); 757 F.2d 729 (5th Cir. 1985), *petition for cert. granted*, 106 S.Ct. 1633 (1986), *cert. vacated*, 54 U.S.L.W. 3809 (U.S. June 10, 1986) (No. 85-99).

The prior briefs to the Court and the brief to the Fifth Circuit Court of Appeals *In Re Anschuetz & Co., GmbH* are attached hereto as Appendices A, B, and C.

take evidence solely and exclusively with its courts. Having personal jurisdiction over a party in and of itself does not authorize American courts to apply the Federal Rules of Civil Procedure in disregard of the Convention.

ARGUMENT

I. Judicial Assistance between U.S. and Foreign Courts prior to the Hague Convention

The signatories to the Evidence Convention entered into the treaty to end the high level of confusion and chaos in obtaining evidence abroad in transnational litigation prevailing prior to the Convention.[3] Until 1972, when the United States ratified the Hague Service[4] and Evidence Conventions, only U.S. domestic law provided procedures for gathering evidence abroad in proceedings before U.S. courts.[5]

Rule 28(b) of the Federal Rules of Civil Procedure, as amended in 1963, applicable to *outgoing* requests, provides for the taking of evidence abroad either in accordance with the law of the foreign country, or

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[3] For a description of the state of transnational litigation in the absence of organized cooperation see Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515 (1953); Heilpern, *Procuring Evidence Abroad*, 14 Tul.L.Rev. 29 (1939); Schein, *Inter-American Judicial Cooperation in Practice*, 18 D.C.B.J. 446 (1951).

[4] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature*, November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (entered into force between the Federal Republic of Germany and the United States on December 22, 1977).

[5] *See, e.g.*, Fed. R. Civ. P. 28(b) (stating the alternative procedures for taking deposition evidence located abroad).

by applying the law of the United States.[6] However, already in their comments to the amendment to Rule 28(b), the drafters expressed their skepticism by acknowledging that some foreign countries were hostile to the idea of allowing discovery to be taken in their country.[7]

Incoming requests for judicial assistance from foreign courts have traditionally received liberal treatment in the United States in accordance with 28 U.S.C. §§ 1781 and 1782. The liberal discovery rules, however, have often been of little practical value in litigation before courts in civil law countries where discovery is unknown, and even more importantly, where judges, not counsel, take evidence as part of their judicial function.[8]

The lack of understanding between civil and common law countries with respect to their different legal systems led to inadequate and chaotic attempts at obtaining evidence abroad.[9] United States judges, frustrated with their attempts to obtain evidence

[6] While 28 U.S.C. §§ 1783 and 1784 also apply to discovery abroad, they are limited to U.S. nationals or residents.

[7] *See* Advisory Committee note to 1963 amendment of Fed. R. Civ. P. 28(b).

[8] For a scholarly analysis of German Law on Evidence, *see* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 Colum. J. Transnat'l L. 231 (1986).

[9] *See, e.g., United States v. Paraffin Wax*, 23 F.R.D. 289 (E.D.N.Y. 1959); *Danisch v. Guardian Life Insurance Co.*, 19 F.R.D. 235 (S.D.N.Y. 1956); *Uebersee Finanz- Korporation AG v. Brownell*, 121 F. Supp. 420 (D.D.C. 1954); *Branyan v. Koniklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953); *Ali Akber Kiachif v. Philco International Corp.*, 10 F.R.D. 277 (S.D.N.Y. 1950).

through judicial cooperation, continued to assert their long-arm jurisdiction to order discovery extraterritorially—backed by the threat of sanctions. These conflicts led to the negotiation and subsequent ratification of the Evidence Convention.

II. The Convention Is Not Limited to Non-party Witnesses

The court in *Aerospatiale* limits the application of the Convention to non-party witnesses. The language and legislative history of this treaty do not support this result. The drafters intended the treaty to apply to the examination of persons regardless of their specific relationship to the litigation.[10] The United States and the Federal Republic of Germany both agree that the Convention applies to "persons" generally and that the distinction between "witnesses, parties and experts" was never contemplated.[11] Experience with the application of the Convention shows that the vast majority of discovery requests were directed to parties, mostly corporate defendants.[12] To limit the ap-

[10] *See Explanatory Report of Philipp Amram (Conference of the Hague Convention on Private International Law) (Actes et documents de la onzieme session*, TOME VI, 148 and 203 (1970).

[11] *See United States Amicus Curiae Brief* at 6, in Club *Mediterranee v. Dorin, appeal dismissed, cert. denied*, 105 S. Ct. 286 (1984), where the Department of Justice reiterated this view first expressed by the U.S. treaty negotiators; Statement of the government of the Federal Republic of Germany on the Act to Implement the Hague Convention, Bundestagsdrucksache 8/218 at 9 (1977), *see also* Appendix A attached hereto, at 9a n.10.

[12] This is substantiated by the fact that all the cases the Court has been asked to decide in connection with the Convention involve discovery against corporations as defendant parties. *Aerospatiale*, 782 F.2d 120; *Anschuetz*, 754 F.2d 602; *Messerschmitt*, 757 F.2d 729; Club *Mediterranee*, 105 S.Ct. 286; *Falzon*, 104 S.Ct. 1260.

plication of the Convention to non-party witnesses renders this treaty useless for practical purposes. To argue that this limited application was the justification for the drafting and ratification of the Hague Evidence Convention, is not supported by the short history of the Convention.[13]

III. The Convention Has Proven to Be a Useful Treaty in German-American Bilateral Judicial Assistance

Germany is a party to the 1954 Hague Civil Procedure Convention,[14] which is the predecessor to the Evidence Convention. In applying the 1954 Convention, the German Court of Appeals in Stuttgart held in 1968, that a request for judicial assistance should be complied with, even though the foreign procedure under which the request is to be executed is not known in Germany, as long as it does not conflict with German law.[15]

The German Court of Appeals in Munich in 1980, in the only decision by a German court on the Hague Evidence Convention, established that requests for judicial assistance should be liberally complied with.[16]

The Munich Court of Appeals stated:

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[13] *See, e.g.*, United States *amicus curiae* brief at 7 n. 3, *Volkswagenwerk AG v. Falzon, appeal dismissed*, 104 S.Ct. 1260 (1984).

[14] Twenty-eight States have adopted the 1954 Convention, to which the United States is not a party; *see* I Ristau, *International Judicial Assistance*, at 6 (1984).

[15] Order of February 13, 1968, Oberlandesgericht (OLG) Stuttgart, in I VA 3/67.

[16] *Corning Glassworks v. International Telephone and Telegraph Corp., (ITT)*, No. 76-0144 (W.D.VA. 1976); Judgment of Nov. 27, 1980, OLG Munich, 9 VA 4/80, translation of the judgment is attached as part of Appendix C at 43a.

> The guiding principle mandating this result is the desire of the Federal Republic of Germany to place judicial assistance with the United States, which previously was carried out only on the basis of comity, on a solid treaty basis, as was done in the Convention on the Taking of Evidence here in question, and thereby also to take due account of the procedural device of "pre-trial discovery" which is unknown in German procedural law but not unfamiliar to Germany's treaty partner. . ."[17]

The German court specifically rejected challenges to the form and substance of the letter of request to take oral depositions. It held that the broad scope of the examination of the witnesses requested would not be in conflict with important and governing principles of German law, nor in violation of public policy.

The court permitted the pre-trial examination of witnesses as to the origin, content, business purpose and economic impact of documents. Counsel for one of the parties present at the taking of the oral depositions in this case expressed his satisfaction with the procedure applied by the German court in complying with the discovery request under the Convention.[18] Traditional deposition discovery can therefore be effectively performed in the Federal Republic of Germany.

Pursuant to a bilateral agreement, first expressed in notes exchanged between the Federal Republic of

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[17] *Id.* at 52a of Appendix C.

[18] Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States*, 16 Int'l Law 575, 584 (1982).

Germany and the United States in 1955/1956,[19] the taking of voluntary oral testimony before U.S. consular officers and diplomats in Germany is permitted. Subsequent to the ratification of the Convention, this permission was reaffirmed on a number of occasions. Most recently, on May 31, 1983, the Federal Republic of Germany informed the U.S. Department of State and the U.S. Department of Justice, that parties to litigation and their attorneys may be present when voluntary testimony is given before consular officers, and that witnesses may also be accompanied by their own counsel.[20]

Frequent use of this method of taking discovery evidence before United States consular and diplomatic officers has been made in the past in the Federal Republic of Germany, as reported to the German Ministry of Justice by the U.S. embassy in Bonn. This method has proven to be an effective procedure of taking discovery evidence in the Federal Republic of Germany in proceedings before U.S. courts.

In addition to the taking of voluntary evidence before U.S. consular and diplomatic officers, 181 formal letters of request from U.S. courts were received by German Central Authorities from 1980 through 1985. 154 of the letters of request were accepted and executed. The remaining 27 were rejected because the evidence to be taken was not sufficiently identified or the request was for the production of documents

[19] U.S. *amicus brief* in *Falzon*, *supra* at 7 n.16.

[20] This bilateral agreement supersedes the Article 33 and 34 declarations to Article 16 of the Convention, made by the Federal Republic of Germany.

for pre-trial discovery.[21] These figures disprove the argument that application of the Convention is futile.

In order to bridge the differences between various legal systems, the Convention permits signatories to express certain declarations, such as the Article 23 refusal to execute requests for the pre-trial production of documents, as known in common law countries.[22] The Federal Republic of Germany has made such a declaration. The right to make this specific, clearly defined declaration was consented to by the United States. Article 23 has caused most of the problems in connection with the application of the Convention and has been used as justification by some circuit courts for rejecting the treaty in its entirety.[23]

Upon ratification of the Evidence Convention, in 1979, the Federal Republic of Germany expressed its willingness to permit the production of certain documents.[24] The Federal Republic of Germany has recently accelerated the procedure for the issuance of regulations which will permit the pre-trial production of documents when they are clearly identified, relevant and do not unneccessarily divulge business se-

[21] Source: Department of Justice of the Federal Republic of Germany.

[22] Article 23: A contracting state may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

[23] *See, e.g., Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D.Vt. 1984); *Graco Inc. v. Kremlin Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Lowrance v. Weinig*, 107 F.R.D. 386 (W.D. Tenn. 1985); *Work v. Bier*, 106 F.R.D. 45 (D.D.C. 1985).

[24] Act to implement the Hague Evidence Convention, Bundesgesetzblatt December 22, 1977 I 3106, translated in Appendix A, at 12a.

crets. The government of the Federal Republic of Germany is endeavoring to issue the regulations before the end of 1986, after the necessary consent of the Bundesrat (Upper House of Parliament) has been obtained. This corresponds with suggestions made by the Government of the United States on the diplomatic level.

The decision of the Munich Court of Appeals, the liberal practice of granting the taking of evidence before consular and diplomatic officers of the US, and the anticipated issuance of regulations by the German government permitting the pre-trial production of documents, demonstrate the willingness of the Federal Republic of Germany to meet the needs of the American courts to the extent possible. For these reasons the Article 23 declaration should not detract from recognizing the overall usefulness of the Convention.

IV. The Convention Complements the Federal Rules of Civil Procedure

As a self-executing treaty the Convention enjoys the same status as a federal statute.[25] When there is a conflict between a federal statute and a later treaty, the treaty can work a repeal of the prior inconsistent statute.[26] The courts apply a two step test: a) to ascertain whether the treaty and the statute are truly in conflict, and if so, b) whether the intent of the treaty was to repeal the prior law.[27] Application of the first step of this test for the following reasons

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[25] *See, e.g., Zenith Radio Corp. v. Matsushita Elect. Indus. Corp.*, 494 F.Supp. 1263 (E.D. Pa. 1980).

[26] *Frank Cook v. U.S.*, 288 U.S. 102 (1933).

[27] *Zenith, supra* at 1266

shows that the Convention does not conflict with the Federal Rules, but rather complements them.

The Federal Rules, with the exception of Rules 4(i)(1), 28(b) and 45 (e)(2), were not primarily designed for extraterritorial application.[28] Rule 34 governing production of documents, as contrasted with Rules 4(i)(1), 28 (b) and 45 (e)(2), is silent on whether it may be applied abroad. Unless congressional intent is expressed to the contrary, legislation must be considered to apply only within the territorial jurisdiction of the United States.[29] As there is no expression of congressional intent authorizing the extraterritorial application of the Rules governing discovery (with the noted exception of Rule 28(b)) it follows that these Rules do not apply to taking evidence abroad.

Since the treaty's specific purpose is to regulate the taking of evidence on the territory of another country, the Convention, as the lex specialis, governs extraterritorial discovery, rather than the Federal Rules of Civil Procedure.[30] The Convention replaces the need of U.S. courts to rely on comity when seeking evidence abroad under the Federal Rules with an assurance that judicial assistance, including the extraterritorial conduct of U.S. style pre-trial discovery, is a matter of treaty right.[31]

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[28] Heck, *supra* at 263.

[29] *Foley Bros. Inc. v. Filardo*, 336 U.S. 281 (1949).

[30] *See Preiser v. Rodriguez*, 411 U.S. 475 (1973); *See generally*, Sutherland, Stat. Const. § 15.05 (4th Ed) 1985 Rev.

[31] *See* n.17 OLG Munich at 52a.

Some U.S. courts[32] have given weight to the statement of Philipp Amram, the delegate of the United States and rapporteur to the Convention, that this treaty would effect "no major changes in U.S. procedure nor require any major changes in United States legislation or rules".[33] The only reasonable interpretation of the rapporteur's statement is that the liberal execution of incoming requests from foreign courts as envisioned by Chapter I of the Convention is already authorized by 28 U.S.C. §1782 and that therefore no changes in U.S. rules are necessary.[34]

Two special commissions on the operation of the Evidence Convention met in the Hague in 1978 and 1985 to consider the practical application of and actual compliance with the Convention. Specifically addressed were problems arising in connection with the exercise of the Article 23 declaration. It was indicated that future efforts will be made to explore different means to accommodate the requirements and desires embodied in the United States practice.[35] The Con-

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[32] *See, e.g.*, Judge Briant's opinion in *Compagnie Francaise d' Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984).

[33] Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 Am. J. Int'l L. 104, 105 (1973).

[34] *See* I Ristau at 256.

[35] For a partial transcript of the 1978 meeting *see* 17 ILM 1417 (1978); and for the 1985 Commissioner Report, *see 1985 Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters*, Permanent Bureau of the Conference. (hereinafter cited as 1985 Report).

vention expressly states that difficulties are to be resolved by diplomatic means.[36]

V. Discovery Orders Should Not Violate Judicial Sovereignty of Foreign Nations

The Court of Appeals in *Aerospatiale* correctly acknowledged that the gathering of evidence by foreign attorneys in a civil law country for use in a proceeding abroad is "considered an unlawful usurpation of the public judicial function and an illegal intrusion on that nation's judicial sovereignty."[37] The Federal Republic of Germany also considers it a violation of its judicial sovereignty when a foreign court enforces the production in the United States of evidence which is located in Germany, since only a German court has the legal power to enforce compliance.[38] Even though issued in the United States, such order constitutes an extraterritorial assertion of sovereignty, because it requires acts to be performed in the Federal Republic of Germany where the evidence must be gathered.

In ratifying the Convention, the Federal Republic of Germany gave its consent as to the manner in which it will assist foreign courts in obtaining evidence in its territory. The United States has long recognized that any exceptions to the exercise of the sovereignty of a foreign nation must be consented to by the nation itself. "They can flow from no other legitimate

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[36] Article 36: Any difficulties which may arise between contracting states in connection with the operation of this Convention shall be settled through diplomatic channels.

[37] *In Re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, at 123 (8th Cir. 1986).

[38] "The taking of testimony from witnesses and parties is a typical responsibility of the court", Order of February 13, 1968, OLG Stuttgart, *see* note 15.

source", as stated by Chief Justice Marshall in *Schooner Exchange*.[39] Obtaining evidence in the Federal Republic of Germany is the exclusive function of the German courts in the exercise of their judicial sovereignty.

The geographic fiction that the discovery takes place in the United States ignores the fact, that without the complying act in the foreign country, discovery in the United States would be non-existent. The distinction between preparatory acts abroad and the actual production of evidence in the United States is an artificial one. Signatory nations have repeatedly protested that such discovery orders violate their sovereignty.[40] These protestations have for the most part been disregarded by U.S. courts. The attempts to circumvent the Convention constitute a violation of the principle that treaties are to be interpreted in good faith.[41]

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[39] *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 132 (1812).

[40] Letter from Embassy of the Federal Republic of Germany to the U.S. Department of State (Nov. 7, 1983), *reprinted* in Brief for U.S. as *Amicus Curiae* at 1a, *Volkswagenwerk v. Falzon*, No. 82-1888 (U.S. 1983); Letter from Ambassador of the Federal Republic of Germany to the Supreme Court of Michigan (June 25, 1982), *see also Volkswagenwerk Aktiengesellschaft v. Superior Court*, 33 Cal. App. 3d 503, 505, 109 Cal. Rptr. 219, 220 (3d Dist. 1973); Letter of French Ministry of Justice to U.S. Department of Justice, *reproduced* in Brief for Appellants, *Club Mediterranee, S.A. v. Dorin, appeal dismissed, cert. denied*, 53 U.S.L.W. 3285 (U.S. Oct. 16, 1984); *also*, Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad; The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 764-65 (1983).

[41] *See, e.g., Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902);

A number of signatories have enacted so-called blocking-statutes which prohibit the furnishing of documents or information as evidence in a foreign proceeding.[42] The Federal Republic of Germany has not enacted a blocking-statute. However, when a discovery order of a foreign court violates German law, a German court may issue an injunction prohibiting the production of documents or other evidence being sought.[43] Such an injunction may ultimately lead to confrontation with courts of foreign countries as exemplified in cases involving a blocking-statute. This

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See also Bishop, *Significant Issues in the Construction of The Hague Evidence Convention*, 1 Int'l Litigation Q. 2, 38 (1985).

Treaties must also be *performed* in good faith. *See* Restatement (Second) of the Foreign Relations Law of the United States § 138 (1965).

[42] E.g. the U.K., Protection of Trading Interests Act, 1980; France, Statute No. 80-538 (July 17, 1980) reprinted in Journal Officiel de la Republique Francaise; the Netherlands, Statute enacted on June 28, 1956, reprinted in 1956 Staatsblad 401 and (1958) 413; Sweden, Royal Proclamation of May 13, 1966.

[43] On June 30, 1982, the Regional Court OLG Kiel, *Recht der Internationalen Wirtschaft (RIW/AWD)* 206, (1983), issued an injunction ordering a German bank which maintained a subsidiary in New York, under the threat of a penalty of up to DM 500,000 or 6 months imprisonment, not to comply with a U.S. District Court Order to produce documents pursuant to a subpoena. The court held that courts of the United States have no authority to enforce orders which only German courts are authorized to issue. Even though this case deals with sanctions in an antitrust proceeding, German authors on the subject of the Convention acknowledge that injunctive relief is available to prevent discovery in civil matters, *Stuerner*, 81 ZVglRW at 206 et seq., (1982); *Schuetze*, 21 Zeitschrift fuer Wirtschaft-und Bankrecht, at 636 (1986).

is precisely what the Evidence Convention is designed to prevent.

It would be highly undesirable if the application of the Hague Evidence Convention were to depend on the fact that a country has issued a blocking statute. This would tend to encourage enactment of further blocking statutes and other protective measures so as to prevent the extraterritoral application of U.S. law in violation of the Convention.

The last time the Court addressed the issue of a conflict between the Federal Rules of Civil Procedure and foreign law in the context of an order for the production of documents, was in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). There the Court upheld the power of a district court to require the production of documents located in Switzerland, but denied the sanction of dismissal of the action for the failure to comply with the discovery order.

In *Societe* the Court was not faced, as it is now, with a binding treaty on the taking of evidence abroad, whereby the United States has agreed to respect declarations by the treaty's signatories on the pre-trial production of documents. In the opinion of the amicus, the existence of this treaty requires that the holding in *Societe* be modified so that district courts must apply the methods provided for in the Convention. To hold that the district courts should in each case merely *consider* the applicability of the Convention in the balancing of competing interests effectively denies the Convention its status as a treaty. Such a holding purports to give deference to foreign sovereignty, when it in fact abrogates the treaty which already incorporates the balancing of competing sovereign interests.

The court in *Aerospatiale* cites *Anschuetz*, stating that "the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure."[44] Should U.S. courts strengthen their efforts to comply with an existing treaty ratified by the United States and the Federal Republic of Germany, this would in the opinion of the Federal Republic of Germany, not increase the likelihood of a violation of its sovereignty but would in fact meet its expectations. The Federal Republic of Germany requests that the Supreme Court give the Evidence Convention the force and effect of a solemn treaty obligation as mandated by Article VI, § 2 of the United States Constitution.

CONCLUSION

For the reasons stated above, the Federal Republic of Germany supports the petitioner. Accordingly, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

August 22, 1986

PETER HEIDENBERGER
Counsel of Record for the Federal Republic of Germany
1815 H St., N.W. Suite 400
Washington, D.C. 20006
(202) 296-3181

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[44] *See Aerospatiale*, 782 F.2d 120, at 125-126.

APPENDIX A

No. 85-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & CO., GMBH,
Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

PETER HEIDENBERGER
1815 H St., N.W., Suite 400
Washington, D.C. 20006
(202) 296-3181

Attorney for Amicus Curiae
Federal Republic of Germany

QUESTION PRESENTED

Whether a district court may order the production in the United States of documents located in the Federal Republic of Germany and the taking of oral depositions in the United States of employees of a party residing in Germany in disregard of the multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

This brief for the Federal Republic of Germany is filed with the consent of the parties.[1] With U.S. Department of State circular note, dated August 17, 1978, to the Chiefs of Missions in Washington, D.C., the Federal Republic of Germany was informed that the procedure of transmitting diplomatic notes to the Supreme Court is not authorized by the

[1]Letters expressing such consent are on file with the Clerk of the Court.

rules of the Court, and that the Court prefers foreign governments to present their views by filing amicus curiae briefs.[2] The views of the Federal Republic of Germany are accordingly expressed herewith.

I. INTEREST OF THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

The Federal Republic of Germany's interest in this case derives from it being a state party to the multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (hereinafter cited as Evidence Convention), entered into force between the United States and the Federal Republic of Germany on June 26, 1979. The issue before the Court is the proper interpretation and application of this Treaty to which seventeen nations are parties.[3] The court of appeals' holding in *In re Anschuetz*, 754 F.2d 602 (5th Cir. 1985), permitting a district court to order, under the threat of sanctions, (a) the production in the United States of documents located in the Federal Republic of Germany and (b) the taking of testimony in the United States of petitioner's employees residing in the Federal Republic of Germany, violates the Convention and infringes upon German sovereignty. The substantial interest of the Federal Republic of Germany is further evidenced by its amicus curiae brief to the court of appeals on the issue of the applicability and scope of the Evidence Convention. The Federal Republic of Germany adheres to the position expressed in that brief, but sets forth below in support of the petition for writ of certiorari additional considerations.

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[2]*See* 1978 Digest of U.S. Practice in Int'l Law at 560.

[3]For a list of signatories see 1984 Treaties in Force at 251.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, a corporation organized under the laws of and domiciled in the Federal Republic of Germany, is a third party defendant to a complaint for damages resulting from the alleged failure of a steering device furnished by petitioner in a vessel involved in a ship collision in the port of New Orleans.

The district court ordered the taking of depositions of petitioner's employees in Germany and the production in the United States of documents located in Germany. *Anschuetz*, 754 F.2d at 604. The court of appeals denied petitioner's application for a writ of *mandamus*. In denying the writ of mandamus the court of appeals held that a district court may order a party to produce in the United States documents located in the Federal Republic of Germany and to make available its employees residing in Germany for depositions in the United States.

III. SUMMARY OF ARGUMENT

To hold the Convention applicable only to the taking of evidence from persons over whom the court does not have jurisdiction[4] renders the Convention meaningless and is inconsistent with its language and with the intent and expectations of its signatories. Moreover, the court of appeals' decision, allowing courts to order, under the threat of sanctions, the removal of documents located in Germany to the United States and the testimony of German residents in the United States, violates the Federal Republic of Germany's sovereignty. The Federal Republic of Germany considers

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[4]The court of appeals recognized the applicability of the Convention to the taking of involuntary depositions of a party in the Federal Republic of Germany and to the production of documents gathered from persons in Germany who are not subject to the court's *in personam* jurisdiction. *Anschuetz*, 754 F.2d at 615.

the Evidence Convention a workable treaty. It believes the issues of its application and its scope deserve consideration by the Court. Therefore the Federal Republic of Germany supports the granting of certiorari.

IV. ARGUMENT

1. The Holding in Anschuetz is Inconsistent with the Language and the Legislative History of the Evidence Convention

The court of appeals limited the Convention to the taking of evidence abroad from persons over whom a district court does not have *in personam* jurisdiction and to involuntary depositions of a party conducted in a foreign country. Such limitations to non-party witnesses are inconsistent with the language, spirit, and legislative history of the Evidence Convention, and, if upheld, would substantially narrow its intended use.

The court of appeals, in analyzing the Convention's applicability, drew distinctions between (a) "parties" and "witnesses" and (b) "parties subject to the court's jurisdiction" and "persons not under the court's jurisdiction". These distinctions are not expressed in the text of the Convention and the drafters never intended them to exist.[5] The drafters intended the treaty to apply to the examination of persons regardless of their specific relationship to the litigation.[6] They therefore considered it unnecessary to distinguish between "witnesses, parties and experts", since these

[5] *Explanatory Report of Philip Amram (Conference of the Hague Convention on Private International Law)*, Actes et documents de la onzieme sessione, TOME VI, 203 (1970) (hereinafter cited as Actes et documents).

[6] *Id.*

terms fall under the comprehensive and broad category of "persons".[7]

The United States delegation negotiating the treaty also expressed that "party" and "witness" were encompassed in the broad term "person".[8] It referred to Article 3 (e), (f) and (g) of the Convention which provides that a Letter of Request may be used to examine "persons".[9]

The German interpretation of the Evidence Convention coincides with the United States' interpretation. The legislative history of the treaty in the Federal Republic of Germany reveals that when the government presented the treaty to the Bundestag (parliament) for ratification, it intended that the requests for the taking of evidence abroad were to be directed at "persons", and that no distinction between parties and witnesses was to be made.[10]

The report on the Act to Implement the Evidence Convention by the Bundesrat (Upper House) either refers to "persons" or to both "parties and witnesses".[11] It never used or intended to use the term "party" or "witness" exclusively.

Accordingly, the positions taken by the United States and the Federal Republic of Germany are in agreement that the

[7] *Id.*

[8] *Id.* at 30.

[9] *See also* United States *amicus curiae* brief at 6 in *Club Mediterranee v. Dorin, appeal dismissed, cert. denied*, 53 U.S.L.W. 3285 (U.S. Oct. 16, 1984) where the Department of Justice reiterated this view first expressed by the U.S. treaty negotiators.

[10] *Statement of the Government of the Federal Republic of Germany on the Act to Implement the Hague Convention*, Bundestagsdrucksache 8/218 at 9 (1977).

[11] *Report of the German Bundesrat on the Act to Implement the Hague Convention*, Bundestagsdrucksache 8/217 at 54 (1977).

Convention applies to persons generally. Neither country intended to limit the treaty's application solely to persons not under the court's jurisdiction as expressed by the *Anschuetz* court.

2. In Personam Jurisdiction is not Absolute in International Litigation

The vast majority of requests for the production of documents located in Germany is directed to parties subject to an American court's *in personam* jurisdiction. Limiting the Convention, as the court of appeals did, to cases in which persons are not subject to the court's *in personam* jurisdiction, would result in such infrequent use of the treaty as to render it meaningless. When the drafters convened to negotiate the treaty they could hardly have contemplated drafting a document with virtually no practical applicability.

As the Federal Republic of Germany stated in its brief to the court of appeals, it considers the taking of oral depositions in Germany and the production in the United States of documents located in Germany a violation of its sovereignty unless the order is transmitted and executed by Letter of Request under the Evidence Convention, regardless of whether the United States court has *in personam* jurisdiction over the German party.[12]

The Federal Republic of Germany likewise considers it a violation of its sovereignty when a foreign court forces, under the threat of sanctions, a person under the jurisdiction of German courts to remove documents located in Germany to the United States for the purpose of pre-trial

[12]The United States in its amicus brief at 7 in *In re Anschuetz*, 754 F.2d. 602 (1985) recognized that the concern expressed by the Federal Republic of Germany over its sovereignty ". . . requires the district court to reconsider that order and to apply a careful comity analysis".

discovery, or orders a person, under the threat of sanctions, to leave the Federal Republic of Germany and travel to the United States to be available for oral depositions. The taking of evidence is a judicial function exclusively reserved to the courts of the Federal Republic of Germany.[13] Only its courts are empowered to compel persons under their jurisdiction to comply with orders of a foreign court requiring the gathering of evidence in the Federal Republic of Germany and its removal to the United States.[14] Sovereign states must be committed to protecting their sovereignty within their territory.[15] If a U.S. court's exercise of *in personam* jurisdiction would violate Germany's sovereignty, the court should be required, in accordance with the principles of international comity, to first apply the methods for taking evidence abroad to which the United States and the Federal Republic of Germany have agreed under the Convention.

3. The Court of Appeals Misconstrued the Reservation under Article 23 of the Convention.

The court of appeals erroneously concluded that the reservation under Article 23 of the Convention would give foreign authorities complete power to determine how much discovery may be taken from their nationals who are litigants before American courts. *Anschuetz*, 754 F.2d at 612. Article 23 authorizes a signatory to declare that it will not execute Letters of Request issued for the purpose of obtaining pre--

[13]*See, e.g.*, United States *amicus curiae* brief at 5 in *Volkswagenwerk A.G. v. Falzon, appeal dismissed*, 104 S. Ct. 1260 (1984).

[14]*See, e.g.*, Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad. The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev., 733, 761 (1983) (detailed discussion of "judicial sovereignty").

[15]*See* Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 Int'l Law. 487, 495 (1985).

trial discovery of documents as known in Common Law Countries.

The Article 23 reservation affects only one method of United States discovery. As the Federal Republic of Germany stated in its brief to the court of appeals (at 12) pre-trial discovery by way of oral depositions can be successfully effected in Germany under the Convention.[16] It has furthermore stated (at 14), that Germany permits the production of documents to be used at trial, allows the examination of witnesses relating to documents and intends to consider the practical experience gained thus far and to be gained in the future in connection with the promulgation of regulations for pre-trial production of documents.

The intent to accomodate foreign procedures is further evidenced by Section 14 of the Act to Implement the Hague Evidence Convention in the Federal Republic of Germany which provides:

> (1) Letters of Request which concern a procedure in accordance with Article 23 of the Convention will not be granted.
>
> (2) However, to the extent that the fundamental principles of the German Law of Procedure are not violated, such requests may be granted considering the justified interests of the persons involved, after the requirements for the granting of such requests and the applicable procedure have been implemented by Regulations which the Minister of Justice with the consent of the

[16]*See* Platto, *Taking of Evidence Abroad for Use in Civil Cases in the United States*, 16 Int'l Law. 575 (1982), where the author, an attorney of record in a transnational litigation, expressed his satisfaction with the execution of a request to take oral depositions by a German court in Munich.

> Bundesrat (Upper House of Parliament) may issue. Bundesgesetzblatt 1977 I 3106.[17]

The reservation under Article 23 was thoroughly deliberated by the negotiators of the Convention and was agreed upon to satisfy the different legal systems to which the Convention would apply.[18]

The head of the United States delegation and official rapporteur of the Convention made it clear that the civil law countries could not be persuaded to change their procedures overnight to accomodate the liberal U.S. evidence taking procedures.[19] This clearly expresses the motivating force behind the drafting of the Convention to establish a uniform set of minimum procedures acceptable to all signatories to take due account of the substantial differences between the various legal systems involved. The holding of the court of appeals makes the reservation under Article 23 meaningless and establishes a result through judicial action which the signatory states could not and did not agree to at the drafting table. This issue deserves consideration by the Court.

4. The Convention Is Workable and Should Be Applied According to Its Terms

The Federal Republic of Germany recognizes that obtaining evidence abroad is not without difficulties and that the

[17]The translation is provided by counsel for the amicus who is a member of the German bar.

[18]*See, e.g., Explanatory Report on the Convention on Taking of Evidence Abroad in Civil or Commercial Matters*, 12 I.L.M. 327, 329 (1973); *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law*, 8 I.L.M. 785 at 809-9 (1969).

[19]Amram, *The Proposed Convention on the Taking of Evidence*, 55 A.B.A. J. 651, 655 (1969).

Convention has not in all respects fulfilled the desire, expressed by the signatories in the preamble, to improve mutual judicial cooperation in civil or commercial matters.

The Convention, however, has not been ineffective between the United States and the Federal Republic of Germany. From December 31, 1979, when the Evidence Convention came into force between the two nations, through 1984, 151 requests under the Convention were addressed to German courts. 131 of these requests were accepted and executed. Most of the remaining 20 requests were rejected because the evidence to be taken was not sufficiently identified or the request was for the production of documents under pretrial discovery.[20]

With regard to future requests for production of documents, the Department of Justice of the Federal Republic of Germany is considering, at the present time, regulations to permit the granting of certain of these requests. The holding in *Anschuetz* hinders this development, because it permits the exercise of discretion by American courts to take evidence abroad either by applying the methods of the Convention or by ordering the evidence to be produced in the United States. As a result the contemplated regulations involving the production of documents would be futile.

In a subsequent decision in *In re Messerschmitt Boelkow Blohm*, 757 F.2d 729 (5th Cir. 1985) the court of appeals reaffirmed its holding in *Anschuetz* permitting the district court to order the production of documents located in Germany in the United States. For the reasons stated above,

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[20]The Department of Justice of the Federal Republic of Germany requested the central authorities who are under the jurisdiction of the German Laender (States) to furnish these figures in order to advise the Court on the past experience with the Convention in the Federal Republic of Germany.

the *Messerschmitt* holding also violates the Evidence Convention and infringes on German sovereignty. The Federal Republic of Germany therefore also supports the petition for writ of certiorari filed in said case.

CONCLUSION

For the reasons stated above the Federal Republic of Germany requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

Date: August 1, 1985

Peter Heidenberger
1815 H St. N.W., Suite 400
Washington, D.C. 20006
(202) 296-3181
Attorney for Amicus Curiae
Federal Republic of Germany

APPENDIX B

Nos. 85-98, 85-99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & Co., GmbH,
Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

MESSERSCHMITT BOLKOW BLOHM, GmbH,
Petitioner,

v.

WALKER, *et al.*
Respondents.

On Petitions for Writs of Certiorari to United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF OF THE AMICUS CURIAE FEDERAL REPUBLIC OF GERMANY

PETER HEIDENBERGER
Attorney for the
Federal Republic of Germany
Amicus Curiae
1815 H St., N.W.
Washington, D.C. 20006
(202) 296-3181

IN THE

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SUPPLEMENTAL BRIEF OF THE AMICUS CURIAE FEDERAL REPUBLIC OF GERMANY

Pursuant to Rule 22.6 of the Rules of this Court, which the amicus curiae deems to be the most nearly applicable, the Federal Republic of Germany herewith respectfully files this brief for the purpose of calling to the Court's attention

the diplomatic note presented by the Federal Republic of Germany to the United States Department of State on April 8, 1986, which is attached hereto. This note underscores the strong interest of the Federal Republic of Germany in obtaining review by this Court of the important issues raised in these cases.

In *Anschuetz* the Court of Appeals for the Fifth Circuit held that "the Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."

The Solicitor General admits that this holding, which he refers to as a mere "statement", is "plainly overbroad" (Brief of Solicitor General, at 17 n.21), that the comity analysis of the *Anschuetz* court is "cursory" (Br. at 13) and that the decision contains "some troublesome language" (Br. at 6), yet he supports the decision for its supposed correct result. However, it is these flawed aspects of *Anschuetz* which other courts have subsequently relied on when ruling on the applicability of the Convention.[1]

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[1] *See, e.g., In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 124-25 (8th Cir. 1986) (relying on *Anschuetz* and holding that when a district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may be physically located within the territory of a foreign signatory to the Covention); *Lowrence v. Weinig*, 107 F.R.D. 386, 389 (W.D. Tenn. 1985) (holding that no comity analysis is necessary when production of documents located abroad is to occur in this country); *see also In re Ljusne Katting*, A.B., No. 85- 2573 (5th Cir. 1985) (citing with approval *Anschuetz* "overbroad" statement, but holding that the Convention must be used when deposing foreign nationals in their home country or inspecting premises in a foreign country).

The Federal Republic of Germany is concerned that the trend toward improved judicial assistance between the United States and the Federal Republic of Germany, reflected by the ratification of the Hague Evidence Convention, may have been halted or even reversed by this decision. The Court should therefore grant certiorari to narrow *Anschuetz* and to enuciate the elements of a proper comity analysis to be used in connection with the Convention.

Respectfully submitted,

PETER HEIDENBERGER
Attorney for the
Federal Republic of Germany
Amicus Curiae
1815 H St., N.W.
Washington, D.C. 20006
(202) 296-3181

APPENDIX A

Embassy of the
Federal Republic of Germany
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to make the following comments on the amicus curiae brief for the United States in the matters of Anschuetz & Co. GmbH, petitioner, v. Mississippi River Bridge Authority, et al, and Messerschmitt-Boelkow-Blohm, GmbH, petitioner, v. Virginia Walker, et al.

The Embassy has taken note, with surprise, of the US Government's recommendation to the Supreme Court not to grant certiorari in a matter on which the Federal Republic of Germany has, throughout the years, continously expressed its grave concern.

In its brief, the US Government seriously underestimates the German Federal Government's resolve concerning German judicial sovereignty which is embedded in the German constitution, and, therefore, cannot be waived by the government. Whether evidence is to be taken on German territory or taken from German territory to another country, the German parties or witnesses concerned have a constitutional right that a German judge supervise the process of taking evidence lest certain fundamental rules of the German law be violated.

The respect of another country's judicial sovereignty is the very principle of international law upon which all international treaties on judicial assistance are based and which the Federal Republic of Germany hoped to see observed by the United States when becoming a party to the Hague Evidence Convention.

Furthermore, the US Government's brief fails to take account of the fact that evidence taken in the Federal Republic of Germany under the procedure of the Hague Evidence Convention can be utilized in American courts.

Verbatim transcripts of witnesses' testimony can be taken and American parties may be present and ask questions at court hearings. Although the taking of documentary evidence is not yet possible in the Federal Republic of Germany during the pre-trial stage, witnesses may be questioned by German courts on the contents of documents located in the Federal Republic of Germany to the extent such documents are relevant to the litigation. The practice of substituting the testimony of witnesses for pre-trial production of documents has in the past been used by US parties seeking evidence in the Federal Republic of Germany.

Thus, through exhausting convention procedure, infringement upon German sovereignty can be avoided without impairing the US interest in granting US plaintiffs such access to evidence as they may need to obtain proof for their claims against German defendants.

The Federal Republic of Germany continues to support petitioners' request in Anschuetz that the US Supreme Court grant certiorari and render a decision taking into account the respect of other countries' sovereignty which is the fundamental principle on which international law is based.

Washington, D.C., April 8, 1986

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-3286

IN RE ANSCHUETZ & Co., GmbH,
Petitioner
COMPANIA GIJONESA DE NAVEGACION
Respondent

Petition for a Writ of Mandamus Directed to the United States District Court for the Eastern District of Louisiana, the Honorable George Arceneaux, Jr., Presiding

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BRIEF OF THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

PETER HEIDENBERGER
Federal Bar Building
1815 H St., N.W.,
Suite 400
Washington, D.C. 20006
(202) 296-3181

Attorney for Amicus Curiae

FEDERAL REPUBLIC OF GERMANY

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QUESTION PRESENTED:

Whether orders of the U.S. District Court for the Eastern District of Louisiana directing the taking of depositions of German nationals in the Federal Republic of Germany and the production of documents located in the Federal Republic of Germany are contrary to the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 28 U.S.C.A. § 1781 (1983 Suppl.).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-3286

IN RE ANSCHUETZ & CO., GmbH,
Petitioner

On Petition for Writ of Mandamus To The United States
District Court for the Eastern District of Louisiana

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

INTRODUCTION

This brief is submitted in response to the Court's order that it welcomes any diplomatic representations which the Department of Justice for the Federal Republic of Germany will make through the Department of State, either directly or through the Department of Justice. The Federal Republic of Germany in response to its request to transmit its representations to the Court was advised by the Department of State that it should present its views through the filing of a brief as amicus curiae in accordance with the U.S. State Department circular note of August 17, 1980, *see* Digest of U.S. Practice in Int'l Law, 560 (1978), attached hereto as Appendix A.

STATEMENT OF THE CASE

Anschuetz & Co., GmbH, (hereinafter referred to as Anschuetz) is a corporation organized under the laws of the

Federal Republic of Germany, domiciled in Kiel, Germany. It is a third party defendant in *Mississippi Bridge Authority v. M/V Pola De Lena, et al.*, C.A. No. 79-470 in the United States District Court for the Eastern District of Louisiana. The third party amended complaint against Anschuetz alleges product liability based on the failure of a steering device furnished by Anschuetz in a vessel involved in a ship collision in New Orleans.

The District Court ordered the taking of depositions of employees of Anschuetz in Kiel, Germany and ordered Anschuetz to produce in New Orleans documents located in Kiel, Germany. Anschuetz opposed these discovery orders on the ground that they violate the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 28 U.S.C.A. § 1781 (1983 Suppl.), (hereinafter referred to as Evidence Convention).

In its ruling of April 13, 1984, on the motion of Anschuetz for review of the discovery orders, the District Court held that the rules of the Evidence Convention do not affect the Court's ability to enforce discovery procedures as authorized by the Federal Rules of Civil Procedure.

The Court stated:

> . . .to say that the combination of Rule 5, which permits service of motions and discovery motions and so forth on counsel of record, Rule 34, which requires a party to produce records which are in his possession, custody or control subject, of course, to protective order of the Court, or Rule 30 (b) (6) which requires that a private corporation who is a party designate one or more officers, directors or managing agents to testify, and to permit them to testify pursuant to the discovery provisions, are all subject to the Hague Convention, to this Court makes no sense at all.

> The Court has personal jurisdiction over Anschuetz. The Court intends to enforce the provisions of the Federal Rules of Civil Procedure as to this party over which it has jurisdiction to the same extent that it would enforce those rules against any party over which it has jurisdiction. The motion, accordingly, will therefore be denied on that ground. (Transcript of hearing of April 13, 1984, p. 8).

On April 19, 1984, Anschuetz filed a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit ordering and directing the District Court to recall its order to produce in New Orleans documents located in Germany and to take depositions in Germany under the United States Federal Rules of Civil Procedure.

ARGUMENT

The Orders of the District Court conflict with the Evidence Convention and violate a treaty the United States have entered into with the Federal Republic of Germany and are therefore invalid.[1] The Federal Republic of Germany intends to show in this brief that in spite of certain restrictions agreed to by the signatories to the Convention the German central authorities and courts have exercised sound discretion, and have shown good faith cooperation in executing requests for the taking of evidence in the Federal Republic of Germany. The Convention is a practicable tool of international judicial assistance between nations with different legal systems and should not be rejected on the grounds advanced by the District Court.

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[1] *See Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353, 356 (5th Cir. 1981).

I. Methods of taking evidence in the Federal Republic of Germany for use in a civil proceeding before a United States Court

The Convention provides for three methods of taking evidence abroad in civil or commercial litigation pending before U.S. courts:

a) A Letter of Request transmitted through a Central Authority (in the instant case the Minister of Justice of the Land Schleswig Holstein, D 2300 Kiel) to a foreign court, which conducts the proceeding (Arts. 1-14);

b) Notice to appear before an American diplomat or consular officer (Arts. 15-16); and

c) Designation of a private commissioner to take evidence (Art. 17).

The Federal Republic of Germany expressed its reservation under Articles 33 and 35 of the Convention not to allow the taking of evidence before a consular officer, a diplomat, or a commissioner. In spite of this reservation the Federal Republic of Germany permits the taking of oral testimony by U.S. consular officers and diplomats on German soil, provided it is conducted on a voluntary basis. This permission was first expressed in notes exchanged between the Federal Republic of Germany and the United States in 1955-1956.[2] Subsequent to the ratification of the Convention this permission was reaffirmed on a number of occasions, the last time on May 31, 1983, when the Federal Republic of Germany further informed the U.S. State Department and the U.S. Department of Justice that parties to litigation and their attorneys may be present when voluntary testimony is given before consular officers,

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[2] *See Volkswagen v. Falzon,* 100 S.Ct. 1819 (1983) Brief of United States as amicus curiae, at 7.

and that witnesses may also be accompanied by their own counsel.

II. The Evidence Convention preempts conflicting provisions of the Federal Rules of Civil Procedure.

a) The Evidence Convention is not supplementary to the Federal Rules of Civil Procedure, to the contrary, it provides the only method for taking compulsory evidence in the Federal Republic of Germany. In its preamble the signatory States expressed their desire to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they utilize for this purpose and their desire to improve mutual judicial co-operation. The preamble of the Convention is a confirmation of the intention of the contracting States to insure that the taking of evidence abroad be effected in accordance with the rules and provisions agreed upon by the signatory States to the Convention. It follows, therefore, that it would be contrary to the spirit of the Convention, as well as to the principles of international legal co-operation, if United States Courts would circumvent the Convention by ordering German nationals or corporations, having their permanent residence or place of business in the Federal Republic of Germany, to submit in the United States to the taking of evidence located abroad.

The Evidence Convention was fashioned after the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, hereinafter referred to as Service Convention.[3] The Courts in the United States have consistently held that the Service Convention to which the Federal Republic of Germany is also a party is exclusively applicable on the service of

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[3] 20 U.S.T. 361, T.I.A.S. No. 6638. *See* Letters of Transmittal of the President of the United States to the U.S. Senate on the Evidence Convention of February 1, 1972; *Volkswagen v. Falzon,* 100 S.Ct. 1819, Brief of U.S. as amicus curiae, at 4.

process in foreign countries.[4] Even though the Evidence Convention supplements the Service Convention, and should therefore be similarly construed, courts in the United States have not done so.[5]

The argument that the methods of the Convention for taking evidence abroad are not exclusive is based on the erroneous conclusion that Art. 27 of the Convention would permit the requesting Court to order other methods of discovery than by Letters of Request.[6] Art. 27 provides:

> The provisions of the present Convention shall not prevent a contracting state from—
>
> a) declaring that Letters of Request may be transmitted to its judicial authorities

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[4] *See De James v. Magnificence Carriers, Inc.*, 654 F.2d 280, 287-289 (3d Cir. 1981); *Porsche, AG v. Superior Court,* 123 Cal. App.3d 755, 760-762, 177 Cal. Rptr. 155, 157-159 (1981); *Low v. Bayrische Motorenwerke,* 88 A.D.2d 504, 505, 449 N.Y.S.2d 733, 735 (1982).

[5] In *General Electric v. North Star Int'l, Inc.*, No. 83-C-0838 (N.D. Ill. 2/21/84) (attached hereto as Appendix "B"); *Philadelphia Gear Corp. v. American Pfauter Corporation,* 100 F.R.D. 58 (E.D.Pa. 1983); *Schroeder v. Lufthansa German Airlines,* 18 Av. Cas. (CCH) 17, 222 (1983); *Volkswagenwerk Aktiengesellschaft v. Superior Court, Alameda County,* 123 Cal. App. 3d 840, 176 Cal. Reptr. 874, 881 (Ct. App. 1981); *Pierburg GmbH & Co. KG. v. Superior Court of Los Angeles County,* 137 Cal. App.3d 238, 136 Cal. Reptr. 876 (Ct. App. 1982) the courts have held that discovery involving German nationals in the Federal Republic of Germany must be initiated in accordance with the Evidence Convention. Contrary, in *Graco, Inc. v. Kremlin, Inc.*, No. 81 C 368 (N.D. Ill. April 13, 1984); *Murphy v. Reisenhauser KG Maschinenfabrik,* No. C/A 81-368 (D.Vt. April 14, 1984), and *Lasky v. Continental Products Corporation,* 569 F.Supp. 1227 (E.D.Pa. 1983) the Evidence Convention was held to supplement, rather than to supplant, the Federal Rules of Civil Procedures.

[6] Supplemental Brief in Opposition to Petition for Writ of Mandamus, p. 2.

> through channels other than those provided for in Article 2;
>
> b) permitting by internal law or practice, any act provided for in this Convention to be performed upon less restrictive provisions;
>
> c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention;

Under these provisions the Federal Republic of Germany has the right to declare that it would also permit discovery by means other than by Letters of Request. Article 27 does not permit the U.S. District for the Eastern District of Louisiana to provide for an alternate method of taking evidence in Germany, such as under the Federal Rules of Civil Procedure.[7]

Therefore, Article 27 of the Convention does not support the argument that the Evidence Convention is permissive, it merely states that incoming requests can be executed more liberally than required under the minimum compliance standards agreed to by the contracting States in the Convention. To hold that the Evidence Convention is applicable at the discretion of the trial judge would make this Convention meaningless.

The Federal Republic of Germany's insistence on permitting only the Letters of Request procedure for the compulsory taking of evidence in Germany is based on the principle that the taking of evidence in connection with a court proceeding is a sovereign act under German law. Other civil law countries also adhere to this principle which is applied regardless whether the taking of evidence is performed by a court or an attorney of record in foreign

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[7] *See Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. at 60; Explanatory Report on Evidence Convention, 12 I.L.M. at 341.

litigation. Compliance in Germany with the order of the U.S. District Court mandating the taking of oral depositions in Kiel, Germany, and the production of documents located in Kiel, Germany, would be a violation of German sovereignty unless the order is transmitted and executed by the method of Letter of Request under the Evidence Convention.

b) The Federal Republic of Germany is aware that the federal and state courts that have considered the applicability of the Evidence Convention have concluded that, regardless of whether the Convention establishes pre-emptive and exclusive rules of discovery, the principles of international comity strongly counsel that, as a matter of judicial self-restraint, a court order parties to abide by the Convention.[8] The Federal Republic of Germany agrees with the reasoning expressed in recent decisions of American courts[9] that parties should proceed in the manner set forth in the Evidence Convention before seeking further resort from the court.

The treaty is the only basis on which compulsory evidence may be taken in the Federal Republic of Germany for use in litigation before American courts; the principles of comity among nations governed judicial assistance prior to the Convention. The Convention as a treaty between the two countries supersedes the Federal Rules of Civil Procedure whenever their application would result in actions that violate the sovereignty of the Federal Republic of Germany.

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[8] *See General Electric Co. v. North Star Int'l., Inc.*, No. 83-C-0838, N.D. Ill., at 4.

[9] *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. at 61; *Volkswagenwerk AG. v. Superior Court, Alameda County*, 123 Cal. App. 3d at 858.

III. The Evidence Convention is not rendered inapplicable by the District Court having in personam jurisdiction over the German defendant.

The District Court in its ruling of April 13, 1984, stated:

> The Court has jurisdiction over Anschuetz. Anschuetz can produce the documents in the United States, and be subject to our discovery provisions. The Treaty was not designed to create a Chinese Wall among nations. It was designed to facilitate the securing of evidence among various nations, giving due deference to the various differences which exist within their judicial systems. (Transcript of hearing of April 13, 1984, p. 8).

The Evidence Convention does not include any provisions with reference to the jurisdiction of the courts of the nations which are signatories do it. The Convention provides for means of taking evidence regardless of whether the court has jurisdiction over a particular party or witness.

Under the Evidence Convention a U.S. Court can compel a foreign witness to give evidence. The Federal Republic of Germany permits the compulsion of witnesses to give testimony in its territory provided the requesting court abides by the Evidence Convention. Accordingly, the Evidence Convention cannot only be seen as a means to limit or restrict the evidentiary rules within the United States, it also enlarges them to a considerable degree. The applicability of the Convention is not dependent on any statutes or laws conferring jurisdictio[10]

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[10] *See Falzon*, 100 S.Ct. 1819, Brief of U.S. as amicus curiae, at 7 n.3.

IV. Past experience with requests for the taking of evidence in the Federal Republic of Germany indicates cooperation by German courts and authorities.

The German Law of Civil Procedure does not provide for pre-trial discovery.[11] However, past experience shows that litigants can expect cooperation by German Central Authorities and Courts in the execution of requests for pre-trial discovery under the Convention.

a) *Depositions:* A Letter of Request to take oral depositions under the Hague Convention was the subject of an appeal to the Court of Appeals Munich (O.L.G. Munich) which is attached hereto and marked Appendix C.[12] The German court cited as the guiding principle governing execution of Letters of Request:

> ....the desire of the Federal Republic of Germany to place judical assistance with the United States, which previously was carried out only on the basis of comity on a solid treaty basis, and to take due account of the procedural device of pre-trial discovery which is unknown in German procedural law, but not unfamiliar to Germany's treaty partner. (Appendix C, p. 13)

Pursuant to this guiding principle, the German Court rejected challenges to the form and substance of the Letter

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[11] *See* Appendix C, p. 14.

[12] In *Corning Glassworks v. International Telephone & Telegraph Corp. (ITT),* No. 76-0144 (D.Va. 1976) the U.S. District Court for the Western District of Virginia addressed a Letter of Request to the Bavarian Ministry of Justice as Central Authority for the taking of depositions of corporate officers and employees and the production of documents. With judgment of October 31, 1980 the O.L.G. confirmed the refusal by the Central Authority for production of documents and with judgment of November 27, 1980 the Court rejected challenges to the taking of oral depositions.

of Request and held that the broad scope of the examination of the witnesses requested would not be in conflict with important and governing principles of German law, nor in violation of public policy.

Counsel for one of the parties present at the taking of the oral depositions in this case in Munich expressed his satisfaction with the procedure as follows:

> To the credit of the presiding German judge, once the initial procedural hurdles were overcome, the depositions, which did not commence until June 1981, were conducted in a remarkably orderly and efficient fashion. The judge agreed that the depositions could be held in a suitable simultaneous translation facility rather than in the local court as ordinarily required. The German judge undertook to study the documents and our summaries in advance. He proceeded to conduct an extensive examination of each witness in the first instance, after which he allowed us to examine the witness at length. Wide lattitude was allowed in this follow-up examination. We were not limited to filling in the details of the judge's interrogation but were permitted to question areas not covered in the judge's initial examination. Six witnesses were examined on complex anti-trust issues over the course of four weeks.

Several novel procedures were employed to facilitate the depositions. A verbatim transcript was taken, rather than the judge's minutes as in the usual practice. The English questions were translated into German for the witnesses to answer. A transcript was recorded in German and then translated into English. A tape-recorder was uti

> lized, perhaps for the first time in a German court.[13]

There is therefore no indication that pre-trial discovery by way of oral depositions cannot be effected in the Federal Republic of Germany under the Convention.

b) *Production of Documents:* The Federal Republic of Germany declared in pursuance of Article 23 of the Convention that it will not, in its territory, execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.

The O.L.G. Munich in the above referred to Judgment of November 27, 1980 permitted the examination of witnesses concerning the origin, content, business purpose and economic impact of documents; it upheld the Central Authority's denial of the Request for the production of documents.[14]

On a previous occasion the Federal Republic of Germany has stated that under Article 23 of the Convention it would permit the production of documents deemed relevant and necessary by a U.S. Court to be used at trial.[15]

The Foreign Office and the Department of Justice of the Federal Republic of Germany have in connection with the preparation of this brief reviewed their position on the reservation to Letters of Request for the purpose of obtaining pre-trial discovery of documents and have authorized the attorney of record to convey to the Court the position of the Federal Republic of Germany as follows:

> The Federal Republic of Germany recognizes that the reservation not to execute Letters of Request

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[13] Platto, *Taking of Evidence Abroad for Use in Civil Cases in the United States,* 16 Int'l Law. 575, 584, (1982).

[14] Appendix C, p. 14.

[15] *U.S. Steel v. Steag Handel GmbH,* C.A. No. 82-0140,(D.D.C. 1982), where this position was made part of the record.

> issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries, was expressed at the time of the ratification of the Convention without the benefit of recent practical experiences. It intends to consider such experiences in connection with the promulgation of regulations for the implementation of the Evidence Convention.

CONCLUSION

The Federal Republic of Germany has shown herein that:

a) its courts are guided by a spirit of cooperation when executing requests for judicial assistance under the Convention;

b) it interprets requests liberally without insisting on strict compliance with formalities;

c) it permits the taking of voluntary testimony before U.S. consular officers and diplomats;

d) it permits the production of documents to be used at trial;

e) it allows the examination of witnesses relating to documents, and

f) it has in connection with this brief expressed its intention to consider the practical experience gained so far and to be gained in the future, in connection with the promulgation of regulations for pre-trial production of documents.

The Evidence Convention should therefore be complied with, including the reservations expressed by the signatories in accordance with Article 23 of the Convention. Only if the Convention is applied by U.S. courts to requests for taking evidence abroad, can it be determined by the courts and authorities of the Federal Republic of Germany

whether further modifications are desirable and justified. The outright refusal by the District Court to apply the terms of the Convention in the instant case would not further such process.

For the reasons stated above, the Federal Republic of Germany supports the Petition for Writ of Mandamus ordering and directing the recall of the orders of the District Court for the production of documents located in Germany and the taking of depositions in Germany.

Respectfully submitted,

Date: September 25, 1984

/s/ PETER HEIDENBERGER
PETER HEIDENBERGER
400 Federal Bar Building
1815 H Street, N.W.
Washington, D.C. 20006
Tel.: (202) 296-3181
Attorney for the amicus curiae
Federal Republic of Germany

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 1984 I caused the foregoing Brief of the Federal Republic of Germany as amicus curiae to mailed, postage prepaid, to James O. M. Womack, Esq., Burke & Mayer, 1600 One Shell Square, New Orleans, Louisiana 70139, attorneys for Boh Brothers Construction Company, Neal D. Hobson, Esq., Miling, Benson, Woodward, Hillyer, Pierson & Miller, 1100 Whitney Bank Building, New Orleans, Louisiana 70130, attorneys for Anschuetz & Co. GmbH, and Campbell E. Wallace, Esq., Chaffe, McCall, Phillips, Toler & Sarpy, 1500 First National Bank of Commerce Building, New Orleans, Louisiana 70112, attorneys for Navera Santa Catalina, S.A.; CIA Gijonesa de Navegacion, S.A.

/s/ PETER HEIDENBERGER
PETER HEIDENBERGER

Appendix C

Judgment of 27 Nov 80

Translation from German
Docket No. 9 VA 4/80

Petition for Review of an Administrative Ruling under Secs. 23 et seq., EGGVG*

1) Siemens Aktiengesellschaft, Munich,

2) Siecor GmbH,

3) Bernd Zeitler,

4) Gerhard Blaimer,

5) Werner Schubert,

6) Dr. Wulf-Dieter Seiffert,

7) Dr. Hans Behnke,

8) Heinz Hirthe,

Petitioners

Attorneys of record: Dr. Jakob Strobl & Assoc., Maximilianplatz 10, 800 Munich 2,

against

the decision of the Bavarian Ministry of Justice of 2 June 1980, File No. 9341 E - I a l- 403/80

Concerning

the request for judicial assistance of the U.S. District Court for the Western District of Virginia, Roanoke, Virginia 24006, dated 17 December 1979

issued in

Civil Case No. 76-0144

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* Tr. note: "EGGVG" = Introductory Law to the Court Organization Act.

CORNING GLASS WORKS, CORNING, N. Y., USA,
v.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
320 Park Avenue, New York, N.Y. 10017, USA (ITT)

the 9th Civil Chamber of the Oberlandesgericht (Court of Appeals) Munich, composed of Dr. Schmadl, Presiding Judge, and Prof. Dr. Blomeyer and Dr. Naegelein, Judges, issues on 27 November 1980 the following

Decision:

I. The petition of 7 July 1980 of the corporate petitioners Siemens AG and Siecor GmbH as well as of the individual petitioners Bernd Zeitler, Gerhard Blaimer, Werner Schubert, Dr. Wulf-Dieter Seiffert, Dr. Hans Behnke and Heinz Hirthe, who are named as witnesses, concerning the decision of the Bavarian Ministry of Justice of 2 June 1980 is dismissed for lack of merit.

II. The Petitioners shall bear the costs of the proceedings.

III. The value of the subject matter in dispute is assessed at 100,000 German Marks.

Reasons:

A.

In a suit pending since 1976 before the U.S. District Court for the Western District of Virginia, the American company Corning Glass Works, plaintiff, prosecutes against the American company International Telephone & Telegraph Corporation (ITT), defendant, claims for damages and injunctive relief because of defendant's alleged infringement of U.S. patents held by plaintiff for optical waveguide fibers; ITT has counterclaimed for damages al-

leging that Corning has misused its patents by entering into restrictive agreements with dominant telecommunications companies in the United States and throughout the world, including the Federal Republic of Germany.

On motion of ITT, the American court issued a Letter of Request on 17 December 1979 addressed to the Bavarian Ministry of Justice, based on the Hague Convention on the Talking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970 (BGB1, 1977 II S. 1472); [the American court] requested that the individual Petitioners be examined by a court as witnesses and that the corporate Petitioners be ordered to produce numerous documents, identified in Schedule A to the letter of request, to the attorneys for the parties to the proceeding for inspection and copying. The complete text of the letter of request is contained in a certified translation prepared by a sworn translator for the English language, which translation is attached hereto as Enclosure 1 and forms part of this decision.

With an official reply of 2 June 1980 (9341 E 1 a - 403/80) - the full text of which is attached to this Decision as Enclosure 2 - the Bavarian Ministry of Justice complied with the request for the examination of witnesses. The request for production of documents was denied on the ground that that part of the request would involve a "discovery of documents" which, in accordance with Article 23 of the Convention the Federal Government declared it would not execute and which could not be executed pursuant to § 14(1) of the Implementing Law of 22 December 1977 (BGB1 S. 3105), since to date no implementing regulations have been issued under the authority of § 14(2) of the Implementing Law which would permit execution of such requests under certain conditions.

The petition of ITT of 1 July 1980 challenged the denial to order the production of documents; following this Court's review of the lawfulness of the administrative ruling pur-

suant to § 23 EGGVG, the petition was dismissed as being unfounded with a Decision issued by this Panel on 31 October 1980 (9VA 3/80), which Decision is attached as Enclosure 3, and to which reference is made for particulars.

With a brief dated 7 July 1980, received by the court the same day, the Petitioners here seek court review of the lawfulness of the approval of the request for an examination of witnesses (which approval was announced on June 6 1980) and the revocation of this approval on the ground that it constituted an unlawful administrative act which violated the civil rights of the individual Petitioners and the protected business interest of the corporate Petitioners in the enterprises established and carried on by them. The Petitioners contend that the requested examination of witnesses should not have been approved, since such approval would improperly force the individual Petitioners to testify as witnesses before a German judge in aid of a foreign proceeding and the corporate Petitioners could suffer considerable harm in their competitive standing against ITT world-wide. The letter of request of the American court was inadmissible because it disregarded numerous formal and substantive requirements mandated by the Convention; moreover, it was contrary to the German public policy ("ordre public") because it was inconsistent with fundamental principles of the German law of civil procedure: its purpose was to conduct a fishing expedition which is not sanctioned by German law.

With respect to the specific objections of each of the Petitioners, reference is made to their briefs of August 7, 1980 (Record 50/90), August 14, 1980 (Record 91/92) and September 9, 1980 (Record 108/113) together with their enclosures.

At the hearing held by this Panel on 7 November 1980, the matter was argued by counsel for the Petitioners and for ITT (Record 129/131).

B.

I.

The petition is admissible for all Petitioners pursuant to § 23 EGGVG since it sets forth clearly the alleged violation of their rights and has as its purpose court review of the legality of the examination of witnesses requested by the American Letter of Request and granted by the Bavarian Ministry of Justice - an act of judicial administration regulating an aspect of the law of civil procedure - and seeks the revocation of such action (Baumbach-Lauterback, 29th edition, § 23 EGGVG, Anno. 1 A, C; § 24 EGGVG, Anno. 2, 4; Annex to § 168 GVG, Anno. 1 A, 2 A); and since it was timely filed within the period of one month required by § 26(1) EGGVG (§ 29(2) EGGVG, § 22(1) FGG, §§ 187(1), 188(2), 193 BGB).

The alleged violation of rights not only concerns the individual Petitioners who, having been ordered [by the Ministry] to be examined as witnesses, are now required to appear and testify before a German judge in aid of a foreign court proceeding - an obligation which, as German citizens, they do not ordinarily have. The examination of witnesses which has been ordered would also interfere with the legally protected rights of the corporate Petitioners and not only with their "sphere of interests" - the latter would not provide sufficient grounds for seeking court review (Maunz/Duering, Anno. 34, 35 to Art. 19(4) Grundgesetz [Constitution]; Ule, VwGerichtsbarkeit, 2nd edition, § 42 VwGo § 42, Anno. III 2). In view of the nature of the legal proceedings pending before the American court and the purpose of the letter of request, it is obvious that ITT - a world-wide competitor of the corporate Petitioners in the field of electronics in general and of telecommunications in particular - seeks to ascertain facts regarding competition in that field. In consequence, the legally protected interests of the corporate Petitioners in the business enterprises established and carried on stand

to be adversely affected as regards its trade secrets in relation to their competitors.

II.

The petition, however, is not meritorious.

The order requiring the examination of the individual Petitioners issued by the Bavarian Ministry of Justice in its capacity as the competent "Central Authority" pursuant to Articles 2 and 35(1) of the Convention, § 7 of the [German] Implementing Law and Section B 1 of the announcement of 21 June 1979 (BGB1 II S. 780) was properly entered, so that the Petitioners' rights were not violated by an unlawful act of judicial administration (§ 28(1) EGGVG).

1) Petitioners argue that the request for the examination of witnesses should not have been approved at the outset because the counterclaim for treble damages asserted by ITT in the American proceedings on account of an alleged violation of the antitrust laws by Corning was punitive in nature and, therefore, the American Letter of Request was not issued in a "civil or commercial matter" within the purview of paragraph 1 of Article 1 of the Convention. The argument lacks substance. Aside from the fact that the Petitioners themselves concede that a full-fledged American civil suit is pending (brief of 7 August 1980, page 20), they overlook the fact that Corning, in its capacity as plaintiff, asserts damage claims with respect to patent infringements by ITT which are not in the form of "treble damage"; Petitioners would characterize these claims, too, as punitive in nature. We note in passing that German law recognizes claims for lump-sum damages, though they are subject to strict judicial scrutiny in the field of general conditions of trade, and [German law] recognizes the assertion of civil claims in a criminal proceeding pursuant to § 403, *et seq.* StPO [German Code of Criminal Procedure]. Therefore, there exists no reasonable doubt as to the pendency of American civil proceedings

within the purview of paragraph 1 of Article 1 of the Convention, in connection with which proceedings the Letter of Request was issued.

2) Contrary to the claim asserted here, there were no formal defects in the American Letter of Request and, therefore, there were no impediments to the approval of the request to the extent that it sought an examination of witnesses. In this connection, the following details are relevant:

a) It is true that the American Letter of Request was - contrary to the stipulation in Article 2, paragraph 2 of the Convention - not transmitted directly to the Bavarian Ministry of Justice as central authority by the requesting American court; according to the uncontroverted statement of the Petitioners, it was submitted by a representative of ITT. But, contrary to Petitioners' contention, this channel of transmission does not constitute a formal defect which would be fatal to an approval of the request by the Ministry of Justice. To begin with paragraph 2 of Article 2 of the Convention merely excludes the participation of any other authorities of the State of execution; it does not prohibit the transmission of the request [to the Central Authority] through a messenger. Secondly, it is of no moment to the present case - that § 6, para. 2 of the [German] Implementing Law to Article 10 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965 (BGB1 1977 II page 1453), to which the Federal Republic of Germany and the USA are parties, prohibits the "private service" of court documents. For the transmission of the American Letter of Request to the Bavarian Ministry of Justice does not constitute "service" of a court document in the sense of the above-mentioned Service Convention. Moreover, the American District Court has made express reference to its letter of Request of 17 December 1980 [*sic*; should be "1979"] in its follow-up letter of 19 February 1980 to the Bavarian Ministry of Justice, and

thus it must be deemed to have subsequently approved the way in which the Letter of Request was transmitted.

b) Petitioners claim that, contrary to paragraph 1(e) of Article 3 of the Convention, the addresses of the witnesses to be examined were missing in the letter of request; this constitutes a relatively minor formal defect. Petitioners themselves concede the insignificance [of the omission] and this also follows [from the requirement in the Convention] that an address be given "where appropriate". There was, therefore, no reason to reject the request on that basis. Individual Petitioners 3), 4), 7) and 8) also contend that they are not domiciled within the district of the "Amtsgericht" (County Court) of Munich although they are employed by the corporate Petitioners 1) and 2) in that district. They argue that if they are required to testify in the Amtsgericht Munich (which is the proper judicial authority within the meaning of paragraph 1, Article 9, of the Convention and § 8 of the [German] Implementing Law) they would be unconstitutionally deprived of the judge of their domicile as their legally competent judge (Article 101, para. 1, sentence 2, of the German Constitution; § 16, sentence 2 GVG [Court Organization Act]). The arguement is devoid of merit. To begin with, the term "legally competent judge" refers to the judge who is competent to *decide* a legal controversy (Judgment of the Federal Constitutional Court, NJW 1964, 1020). The present case raises only the question which local judge is competent to execute a request for judicial assistance. Secondly, the venue provisions of § 8 of the Implementing Law are consistent with the venue provisions in paragraph 1 of § 157 GVG [Court Organization Act] for judicial assistance as between German courts, and are also in conformity with the venue provisions for proceedings for the perpetuation of evidence pursuant to § 486, para. 2 ZPO [German Code of Civil Procedure], according to which venue is proper at any place where the witness is to be found (Baumbach-Lauterback, § 157 GVG, Anno.1; § 158 GVG, Anno 2; OLG

Hamm MDR 57, 437; Zoeller, 12th edition, § 157(2) GVG venue may be concurrent in several courts in a given place. Therefore, it cannot be said that Petitioners 3), 4), 7) and 8) would be "deprived" of their legally competent judge if they were to be examined as witnesses by the Amtsgericht Munich, i.e., they will not be arbitrarily subjected to the powers of a judge who is not competent for them (Judgment of the Federal Constitutional Court 3, 359 (364); BGH [Judgment of the Federal Supreme Court] NJW 62, 1396).

3) Petitioners concede, and the Court agrees, that the "nature of the proceedings"—as required by paragraph 1(c), Article 3, of the Convention—is sufficiently specified in Item 2 of the Letter of Request, so that no impediment to the execution of the request is present. On the other hand, Petitioners' other formal objections - which are interrelated - are not without substance. Petitioners claim that the "necessary information in regard to the proceedings" [for which the evidence is required] - as required by paragraph 1(c), Article 3, is insufficient, and that the "questions to be put to the persons to be examined or a statement of the subject-matter about which they are to b examined" (paragraph 1(f), Article 3, of the Convention) have not been furnished. These formal requirements - which, Petitioners say, have been insufficiently complied with or disregarded - go to the core of the conflict between German and American procedures, especially as regards fishing expeditions which are not permitted in German procedure.

But these formal objections raised by the Petitioners, which may have a considerable procedural impact, are in final analysis unfounded. It is true that in the language of the statement of facts in Item 2 of the Letter of Request with respect to the counterclaim of ITT, namely, "that, inter alia, the plaintiff misused its patents by entering into restrictive agreements with dominant telecommunications companies in the United States and throughout the world,

including the Federal Republic of Germany" - which forms the basis of the counterclaim - falls far short of the detailed statement of facts which is required by German procedural law. The text of the Letter of Request lacks specific references to occurrences, dates, events and material consequences with respect to which the witnesses are to be examined, which ought to be set forth if the questions to be put to the witnesses are not specified in the request (see the disjunctive "or" in Article 3, paragraph 1(f) of the Convention). However, these defects were not substantial enough to cause the Ministry of Justice, in its capacity as central authority pursuant to Article 5 of the Convention, to question the request (cf. also the letter of the "Amtsgericht" Munich of 16 July 1980, File No. AR 354/80, addressed to the American requesting court, asking for a list of questions to be put to the witnesses); nor were these defects so egregious as to require the rejection of the Letter of Request seeking the testimony of the witnesses.

The guiding principle mandating this result is the desire of the Federal Republic of Germany to place judicial assistance with the United States, which previously was carried out only on the basis of comity, on a solid treaty basis, as was done in the Convention on the Taking of Evidence here in question, and thereby also to take due account of the procedural device of "pre-trial discovery" which is unknown in German procedural law, but not unfamiliar to Germany's treaty partner, and which was described in the Decision of this Panel of 31 October 1980 (Docket No. 9 VA 3/80) as a fundamental part of an American civil proceeding. This follows clearly from the fact that the declaration under Article 23 of the Convention excludes "pre-trial discovery of documents", and from paragraph 2, Article 9, of the Convention which basically permits execution of a Letter of Request according to the special method or procedure of the requesting State to the limit of incompatibility with the internal law of the State

of execution under paragraph 1, Article 9, of the Convention.
This basic starting point virtually demands the interpretation of the Letter of Request, in the context of Item 3a (examination of witnesses) and b (production of documents), Item 4 and Schedule A, to the end that the witnesses named are to be examined with respect to the documents which are identified by date and subject matter as to their origin, content, business purpose and economic impact. Only to this extent does this Panel authorize the examination of the witness.

The scope of the examination of the witnesses thus authorized is not in conflict with important and governing principles of German law, in particular with German "*ordre public*" in the sense of a violation against the public morals or the policy of a German Law (Art. 30 EGBGB [Introductory Law to the German Civil Code]). Nor in the opinion of this Panel does such a holding amount to a disregard of the [German] declaration under Article 23 of the Convention. German law permits the examination of third persons as witnesses concerning the contents of documents, which documents themselves need not be surrendered or produced. Finally, there can be no question that the sovereignty or the security of the Federal Republic of Germany will be endangered (paragraph 1(b), Article 12, of the Convention). According to paragraph 1 of Article 9 of the Convention, and the relevant provisions of the German Code of Civil Procedure, the examination of witnesses will be conducted by A German judge, in the presence of an American judge familiar with the trial, whose participation has been approved by the Ministry in accordance with Article 8 of the Convention. This manner of proceeding sufficiently ensures that due consideration will be given to the testimonial privileges of the witnesses, in accordance with §§ 383 (1) No. 6, 384 ZPO [German Code of Civil Procedure], the right of the parties and their representatives to examine in accordance with § 397 ZPO, and the

limits of discovery of evidence, whose perimeters are doubtful even under German procedural law depending on the type of proceedings and the facts of the case (Peters, *Ausforschungsbeweis im Zivilprozess*, Beitraege zum Zivilrecht und Zivilprozess, 1966, Heft 16, S. 16, 49, 55, 60/63, 90/91, 120/126). In any event, the prohibition against fishing expeditions in German procedural law is designed for the protection of the adversary who is not required to make available to his opposing party the weapons for the conduct of the lawsuit (BGH NJW 1958, 1491); but it is not designed for the protection of witnesses who are sufficiently protected by the testimonal privileges provided by law (Peters, pages 58 et seq.).

4) The foregoing considerations also refute Petitioners' other objections, namely that Item 5a of the Letter of Request seeks to have the witnesses examined by the attorneys for the parties, which is contrary to German procedural law and the provisions of the Convention; Item 5c seeks permission for the participation of US judge Glenn Conrad. The Ministry of Justice did not comply with these items of the request. In view of this, the Petitioners have not been aggrieved.

5) Finally, the Petitioners contend that the request should not have been approved because it was issued at the "pre-trial discovery" stage of the proceedings and, therefore, the evidence was "not intended for use in judicial proceedings commenced or contemplated", as required by paragraph 2, Article 1, of the Convention. The Decision of this Panel of 31 October 1980 (9 VA 3/80) establishes, and the legal literature there cited teaches, that the "pre-trial discovery" stage not only presupposes a pending judicial proceeding before an American court, but that it is an essential part of the securing of evidence to be introduced at the "trial

III.

For the foregoing reasons, the Petitioners' rights were not violated by an unlawful act of judicial administration. Therefore, their petition must be dismissed as being without merit (§§ 23, 25, 28 EGGVG).

The decision as to costs follows from § 30 (1) EGGVG, § 2 N 130 (1) Kosto (Regulations on Costs).

The Panel assesses the value of the subject matter in dispute 100,000 DM, in accordance with § 30 (1) Ko on the basis of the estimated economical and personal interest of the Petitioners in the cancellation of the order approving their examination as witnesses.